Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Definition of Radio Markets for	)	MB Docket No. 03-130
Areas Not Located in an Arbitron	)	
Survey Area	)	
	)	

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS AND SAGA COMMUNICATIONS, INC.

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October 6, 2003

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EXECUTIVE SUMMARY

The National Association of Broadcasters ("NAB") and Saga Communications, Inc. ("Saga") submit these comments in response to the *Notice of Proposed Rulemaking* seeking comment on how the Commission should define radio markets in areas of the country not located in the "metro" markets defined by Arbitron. In the *Notice*, the Commission generally proposed to create a geographic radio market definition based on counties. The Commission also specifically asked for comment on two pre-existing market definitions, the Metropolitan/Micropolitan Statistical Areas ("MAs"), defined by the Office of Management and Budget based on population and commuting patterns, and the Cellular Market Areas ("CMAs"), defined by the Commission for the granting of cellular licenses.

NAB and Saga urge the Commission to reconsider its proposal to create a county-based geographic market for radio in areas of the country not located in Arbitron metro markets. Given the Commission's preference for geographically-defined radio markets expressed in the *Notice*, we made every effort to find a geographic market definition that would establish rational and coherent radio markets across widely varying areas of the country. NAB and its outside consultant, BIA Financial Network ("BIA"), conducted extensive empirical research to determine whether four specific geographic market definitions (the two proposed by the Commission and two additional ones) were feasible options. Based on this research, it is clear that these various geographic markets do not reflect radio service in a consistent, predictable or accurate manner. Each of these options would result in far more "anomalies" and distortions than would retaining the modified contour overlap market definition recently approved by the Commission in its biennial review of the broadcast ownership rules.

As detailed in the attached study by BIA, the two pre-existing market definitions suggested by the Commission (MAs and CMAs) both suffer from very serious drawbacks that make them unsuitable for defining radio markets. As an initial matter, MAs do not cover the entire country, and thousands of radio stations (nearly 19 percent of the total in the United States) are not included in any MA. Quite large numbers of MAs and CMAs also overlap Arbitron metros. These overlap areas make defining consistent and rational radio markets even more difficult, and present problems with the most basic questions of market definition, such as determining the number of radio stations counted as being in the market.

But most seriously, neither MAs nor CMAs reflect actual patterns of radio service nor, indeed, have any relation to the radio industry. Consequently, adoption of CMAs or MAs, as shown by the BIA study, would create innumerable anomalies. Utilization of these market definitions would, *inter alia*, assign to the same market radio stations that do not compete against each other, primarily due to their wide geographic separation, and, in many instances, assign stations that actually do compete against each other to separate markets, thereby significantly understating the number of stations that should be regarded as being in the market. Because MAs and CMAs are strictly county-based, stations located in counties adjacent to an MA or CMA will never be counted as serving that MA or CMA because they are located outside the market. Radio signals, however, easily cross county borders, and stations located in a county outside, but adjacent to, an MA or CMA will often serve a substantial part (or even all) of the neighboring MA or CMA and compete for listeners and advertisers with stations located in the MA or CMA. Some CMAs are similarly artificially constricted by state boundaries. Perhaps not surprisingly, the adoption of a geographic definition that is wholly unrelated to radio service in the "real world" would also make large numbers of existing radio clusters noncompliant under the local ownership caps. And these existing groups would be thrown out of compliance with the multiple ownership rules, even though they were legitimately formed in reliance on long-standing Commission policy and no basis exists for the Commission to conclude that these stations do not serve the public interest.

Beyond the two market definitions suggested in the *Notice*, NAB and BIA investigated two other options for developing a geographic market definition. One approach involved defining a market (referred to as a Center of Commerce Area or "COCA") around the most populous city in every county not included in any Arbitron metro, and then assigning to the COCA every radio station located within certain maximum distances of each identified population center. Unfortunately, we concluded that these COCAs suffer from a number of significant practical difficulties, including problems with determining the appropriate maximum distance standards and with developing criteria for combining these single-county COCAs into markets that accurately and consistently reflect radio service. And the final approach considered – creating radio markets based on actual listening patterns – floundered at the outset due to problems with the available data.

In contrast, the Commission's traditional approach of utilizing station contours to define radio markets does not suffer from these many drawbacks of geographically-defined markets. Unlike MAs and CMAs, the contour overlap approach actually relates to radio. Contours reflect radio service in the "real world," accurately identify stations with the potential to compete against each other for listeners and advertisers, are not artificially constricted by county or state boundaries, and work equally well in all parts of the country, whether East or West, urban or rural. Moreover, in the recent biennial review of its broadcast ownership rules, the Commission adjusted the contour overlap approach to correct the only two anomalies that had been shown to occur with any frequency when utilizing this approach. And despite the Commission's theoretical concerns as to the unusualness or singularity of the contour overlap approach, it would be the use of pre-defined geographic markets unrelated to the radio industry that would be inconsistent with accepted methods identified by the Department of Justice for determining the relevant geographic market in assessing radio transactions.

Accordingly, the Commission can show no basis for rejecting its adjusted contour overlap approach in favor of a geographically-defined market that does not relate in any way to radio and that consequently produces demonstrably anomalous and, indeed, irrational results in defining radio markets. Because geographic markets unrelated to radio do not reflect radio service as consistently, predictably or accurately as contours, the Commission has no viable, practical alternative but to retain its contour overlap approach for defining radio markets in areas not located in Arbitron metros.

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Definition of Radio Markets for Areas Not Located in an Arbitron Survey Area	)))	MB Docket No. 03-130
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To: The Commission

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS AND SAGA COMMUNICATIONS, INC.

The National Association of Broadcasters ("NAB")[1] and Saga Communications, Inc. ("Saga")[2] submit these comments in response to the Commission's *Notice of Proposed Rulemaking* in this proceeding.[3] The *Notice* sought comment on how the Commission should define radio markets in areas of the country not located in the "metro" markets delineated by Arbitron.[4] In the *Notice*, the Commission generally proposed to create a geographic radio market

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1 NAB is a nonprofit incorporated association of radio and television stations, which serves and represents the American broadcasting industry.

2 Saga Communications, Inc. is a broadcasting company whose business is devoted to acquiring, developing and operating broadcast properties. Saga owns or operates broadcast properties in 23 markets, including 46 FM and 25 AM radio stations, two state radio networks, one farm radio network, four television stations and three low power television stations.

3 *Notice of Proposed Rulemaking* in MB Docket No. 03-130, FCC 03-127 (rel. July 2, 2003) ("*Notice*").

4 As part of its 2002 biennial review of all the ownership rules, the Commission determined to use Arbitron metros as the presumptive radio market in areas where they are defined. *See Report and Order*, *2002 Biennial Regulatory Review* in MB Docket No. 02-277 and MM Docket Nos. 01-235, 01-317 and 00-244, FCC 03-127 (rel. July 2, 2003) ("*Biennial Review Order*"). NAB

definition based on counties, and specifically asked for comment on two pre-existing market definitions, the Metropolitan/Micropolitan Statistical Areas ("MAs") and the Cellular Market Areas ("CMAs").

NAB and Saga urge the Commission to reconsider its proposal to create a county-based geographic market for radio in areas of the country not located in Arbitron metro markets. Given the Commission's preference for geographically-defined radio markets expressed in the *Notice*, we made every effort to find a geographic market definition that would establish rational and coherent radio markets across widely varying areas of the country. NAB and its outside consultant, BIA Financial Network ("BIA"), conducted extensive empirical research to determine whether four specific geographic market definitions (the two proposed by the Commission and two additional ones) were feasible options. Based on this research, it is clear that these various geographic markets do not reflect radio service in a consistent, predictable or accurate manner. Each of these options would result in far more "anomalies" and distortions than would retaining the modified contour overlap market definition adopted in the *Biennial Review Order.*

As detailed in the attached study by BIA, the two pre-existing market definitions suggested by the Commission (MAs and CMAs) both suffer from very serious drawbacks that make them unsuitable for defining radio markets. As an initial matter, MAs do not cover the entire country, and thousands of radio stations (nearly 19 percent of the total in the United States) are not included in any MA. Quite large numbers of MAs and CMAs also overlap Arbitron metros. These overlap areas make defining consistent and rational radio markets even more difficult, and present problems with the most basic questions of market definition, such as

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and Saga opposed, and continue to oppose, the use of Arbitron metros as the radio market for purposes of applying the Commission's multiple ownership rules. *See* Section II.A. below.

determining the number of radio stations counted as being in the market. But most seriously, neither MAs nor CMAs reflect actual patterns of radio service nor, indeed, have any relation to the radio industry. Consequently, adoption of CMAs or MAs, as shown by the BIA study, would create innumerable anomalies. Utilization of these market definitions would, *inter alia*, assign to the same market radio stations that do not compete against each other, primarily due to their wide geographic separation, and, in many instances, assign stations that actually do compete against each other to separate markets, thereby understating the number of stations that should be regarded as being in the market. Perhaps not surprisingly, the adoption of a geographic definition that is wholly unrelated to radio service in the "real world" would also make large numbers of existing radio clusters noncompliant under the local ownership limits. And these existing groups would be thrown out of compliance with the multiple ownership rules, even though they were legitimately formed in reliance on long-standing Commission policy and no basis exists for the Commission to conclude that these stations do not serve the public interest.

Beyond the two market definitions suggested in the *Notice*, NAB and BIA investigated two other options for developing a geographic market definition. One approach involved defining a market (referred to as a Center of Commerce Area or "COCA") around the most populous city in every county not included in any Arbitron metro, and then assigning to the COCA every radio station located within certain maximum distances of each identified population center. Unfortunately, we concluded that these COCAs suffer from a number of significant practical difficulties, including problems with determining the appropriate maximum distance standards and with developing criteria for combining these single-county COCAs into markets that accurately and consistently reflect radio service. And the final approach considered

– creating radio markets based on actual listening patterns – floundered at the outset due to problems with the available data.

In contrast, the Commission's traditional approach of utilizing station contours to define radio markets does not suffer from these many drawbacks of geographically-defined markets. Unlike MAs and CMAs, the contour overlap approach actually relates to radio. Contours reflect radio service in the "real world," accurately identify stations with the potential to compete against each other for listeners and advertisers, and work equally well in all parts of the country, whether East or West, urban or rural. Moreover, in its *Biennial Review Order*, the Commission adjusted the contour overlap approach to correct the only two anomalies that had been shown to occur with any frequency when utilizing this approach. And despite the Commission's theoretical concerns as to the unusualness or singularity of the contour overlap approach, it would be the use of pre-defined geographic markets unrelated to the radio industry that would be inconsistent with accepted methods identified by the Department of Justice for determining the relevant geographic market in assessing radio transactions.

Accordingly, the Commission can show no basis for rejecting its adjusted contour overlap approach in favor of a geographically-defined market that does not relate in any way to radio and that consequently produces demonstrably anomalous and, indeed, irrational results in defining radio markets. Because geographic markets unrelated to radio do not reflect radio service as consistently, predictably or accurately as contours, the Commission has no viable, practical alternative but to retain its contour overlap approach for defining radio markets in areas not located in Arbitron metros.

I. Pre-Defined Geographic Markets Unrelated To Radio Are Unsuitable For Establishing Market Boundaries In Areas Not Located In Arbitron Metros.

In the *Notice* (at ¶ 658), the Commission asked for comment "on how to draw specific market boundaries in areas of the country not located in Arbitron Metros," and "propose[d] that radio markets be county-based." The Commission specifically sought comment about relying on "pre-existing market definitions in delineating radio markets for non-Metro areas," and suggested two such definitions – the Metropolitan/Micropolitan Statistical Areas and the Cellular Market Areas. *Notice* at ¶¶ 659-60.

Given the Commission's stated preference for geographically-defined radio markets, NAB determined to consider carefully these MAs and CMAs, and to study the possibility of creating a geographic market definition more closely related to the radio industry. NAB and its consultant, BIA Financial Network, conducted extensive empirical research to determine whether four specific geographic market definitions (the two proposed by the Commission and two additional ones) were feasible options.[5] After making every effort to find a geographic market definition that would establish rational and coherent radio markets across widely varying areas of the country, we were forced to conclude that pre-defined geographic markets – particularly those wholly unrelated to the radio industry – do not reflect radio service in an accurate, predictable or consistent manner.

A. Metropolitan/Micropolitan Statistical Areas Suffer from a Number of Serious Drawbacks.

1. MAs Fail to Cover Thousands of Counties and Radio Stations.

[5] BIA examined all MAs and CMAs at a general level, and then analyzed a number of particular MAs and CMAs in more detail to determine whether these markets were consonant with patterns of actual radio service. BIA also examined a number of MAs and CMAs to determine the impact that adoption of these market definitions would have on the radio industry generally and on existing radio clusters specifically.

MAs are defined by the Office of Management and Budget ("OMB") based on population and commuting patterns.[6] Because MA definitions do not cover areas without at least one urban cluster of 10,000 persons or more, 1,378 counties are not included in any MA. More importantly for our purposes, these 1,378 counties contain 2,504 radio stations, or 18.7 percent of the total number of stations in the United States. *See* Attachment, BIA Financial Network, *Analysis of Radio Geographic Market Definitions for Stations in Unrated Areas* at 3 (Oct. 2003) ("*BIA Report*").

As an initial matter, therefore, MAs are unsuitable for defining radio markets because thousands of radio stations are not located in them. The Commission would obviously have to devise some other method of determining the dimensions of radio markets where some or all of the stations involved in a transaction are not located in an MA. The result of having *three* completely different approaches for defining radio markets – Arbitron, MAs and an unspecified system for areas outside of MAs – would be overly complicated, would doubtless produce significant anomalies, and would make application of the multiple ownership rules less consistent and predictable. Especially in light of the clear difficulties in creating a geographic market for radio out of whole cloth for the areas not covered by MAs,[7] the Commission should reject this complex triple system of defining radio markets.

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[6] Metropolitan Statistical Areas have at least one urbanized area of 50,000 or more population, and Micropolitan Statistical Areas have at least one urban cluster of between 10,000 and 50,000 persons.

[7] The *Notice* (at ¶ 659) inquired how radio markets should be defined in areas outside of MAs, but only generally suggested that, in these areas, geographic markets should be established based on population. Given the difficulty of establishing rational and coherent radio markets around centers of population (*see* Section I.C below), the Commission should not assume that it will be able to formulate markets bearing any reasonable relation to radio service in those non-MA areas.

2. Many Areas of Overlap Between MAs and Arbitron Metros Present Thorny Questions of Market Definition.

Beyond failing to define markets for thousands of radio stations, the adoption of MAs would present considerable problems in the many areas where MAs overlap Arbitron metros. There are 112 MAs that contain multiple counties, some but not all of which are included in Arbitron metros. This large number of "mixed" MAs containing some counties that are also within metros would make defining coherent and rational radio markets based on MAs even more difficult, and would complicate the most basic questions of market definition, such as determining the number of radio stations counted as being in the market. The *Notice* (at ¶ 661) inquired as to "how to address the possibility of a market overlap," but offered no suggestions to address these difficult issues.

As detailed in the *BIA Report* (at 3-4), 112 MAs include both counties that are part of an Arbitron metro and counties that are not included in any metro.[8] Within these mixed MAs, it remains unclear how the relevant radio marketplace should be defined. For example, should the radio market in a mixed MA be deemed to consist of the entire MA, including those counties that are also in Arbitron metros? That would arguably seem inconsistent with the Commission's recent adoption of Arbitron metros as the market definition in "rated" areas. Assuming, as the Commission does, that Arbitron metros reflect competitive realities in the radio marketplace, then the addition of non-metro counties to the counties comprising a metro would presumably create markets that do not accurately reflect the radio marketplace. In essence, therefore, these mixed MAs are a mish-mash of Arbitron metro counties and non-metro counties, which cannot be presumed to reflect accurately the radio marketplace.

[8] On average, these 112 MAs have 5.4 counties, 3.6 of which are included in Arbitron metros and 1.8 of which are non-metro counties. *BIA Report* at 4.

However, if the relevant radio market in each mixed MA is deemed to consist of *only* the non-metro counties within the larger MA, the result will often be markets composed of geographically distant (and even non-contiguous) counties with little relation to each other, or even markets consisting of a single "orphan" county detached from the remaining counties in the MA (which are all in Arbitron metros). Appendix One to the *BIA Report* identifies all 112 mixed MAs and the number of Arbitron metro and non-metro counties in each. Fifty-nine of these mixed MAs contain only a single non-metro county. NAB and Saga doubt that many of these single non-metro counties would constitute an appropriate radio market by themselves. It would seem particularly unlikely, in MAs consisting of multiple metro counties and only a single non-metro county, that the single "orphan" county would constitute a rational radio market standing alone.[9] And assuming that these orphan counties in MAs should not, by themselves, be treated as separate radio markets, the Commission would have to develop some criteria for determining which other counties, presumably from the MA, should be added to those orphans to create markets that accurately and consistently reflect radio service.[10]

Examining specific MAs in greater detail even more clearly demonstrates the challenges posed by these mixed MAs in attempting to define rational radio markets. For instance, the

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[9] Many MAs include multiple metro counties and only one non-metro county. *See* Appendix One of *BIA Report* (Augusta-Richmond County, GA-SC; Charlotte-Gastonia-Concord, NC-SC; Chattanooga, TN-GA; New Orleans-Metairie-Kenner, LA; Columbus, OH; Detroit-Warren-Livonia, MI; Charlottesville, VA; Fort Smith, AR-OK; Wichita, KS; Orlando, FL; Toledo, OH; Durham, NC; Montgomery, AL; Albuquerque, NM; Asheville, NC; and Pittsburgh, PA). Other MAs, such as Washington-Arlington-Alexandria, DC-VA-MD-WV, contain two non-metro counties but as many as 20 metro counties. The FCC may find it difficult to show that two orphan non-metro counties in large MAs constitute an appropriate radio market.

[10] If some, but not all, of the Arbitron metro counties in the MAs should be combined with these orphan non-metro counties to form radio markets, the FCC would need to develop criteria to determine which of these Arbitron counties in the MA to add.

Denver-Aurora Metropolitan Statistical Area consists of 10 counties, six of which are in the Denver Arbitron metro and four of which are not part of the metro. *See BIA Report* at 4. As shown by Figure One of the *BIA Report*, these four non-metro counties (Gilpin, Clear Creek, Park and Elbert) are not contiguous and are separated by considerable distances by counties in the metro. These four non-metro counties in the Denver Metropolitan Statistical Area certainly would not constitute a rational radio market, in large part because they are non-contiguous.[11] And if these four non-metro counties should not be treated as a separate market, then what additional counties should be combined with those four to create a market accurately reflecting radio service? Should all, or just some, of the other counties in the Metropolitan Statistical Area (which are all in the Denver Arbitron metro) be treated as being in the same market as the four non-metro counties? Developing criteria enabling the Commission to answer such questions consistently so that the markets created accurately reflect radio service in mixed areas like the Denver MA will be extraordinarily difficult, if not impossible.

An examination of the St. Louis Metropolitan Statistical Area further shows the difficulties presented by mixed MAs when attempting to count the number of stations serving the market. *See BIA Report* at 6. The St. Louis MA contains 17 counties, 12 of which are in the St. Louis Arbitron metro. The five non-metro counties (Crawford, Washington, Bond, Macoupin and Calhoun) are not contiguous and are separated by considerable distances. Figure Two of the *BIA Report* shows the city-grade contours of the 13 stations licensed to the five non-metro

[11] In orders establishing Rural Service Areas ("RSAs") for the cellular industry, the Commission concluded that RSAs containing non-contiguous counties should be separated into "two or more distinct RSAs." *Order on Reconsideration* in CC Docket No. 85-388, RM 5167, 2 FCC Rcd 3366 (1987). However, if these four non-contiguous Denver counties were separated into different markets, this would create still more irrationality. There is no reason to assume that the three contiguous non-metro counties (Gilpin, Clear Creek and Park) by themselves would constitute a coherent radio market, and it seems highly unlikely that the single, non-contiguous county (Elbert) should by itself be treated as a separate radio market.

counties included in the St. Louis MA. The service contours of each of these 13 stations intersect with the contours of their home county stations, as well as the service areas of some stations located in adjacent counties. However, the service areas of these 13 stations do not all intersect with each other, due to the distance between them, even though they are all located within the St. Louis Metropolitan Statistical Area. Clearly, the five non-metro counties in the St. Louis MA would not constitute a rational radio market, as stations located in these non-contiguous and widely separated counties do not serve the same areas and should not be regarded as competing against each other. Defining a radio market to consist of stations, located in distant, non-contiguous counties, which do not compete with each other would be contrary to the Commission's stated goals and would, in fact, be arbitrary and capricious. *See Biennial Review Order* at ¶¶ 256-59, 263 (wanting to delineate a geographic market definition that would enable FCC to measure and protect competition in local radio markets).

As shown by the markets analyzed by BIA and the discussion above, the existence of 112 of these mixed MAs presents difficult, if not intractable, problems in defining rational and coherent radio markets in many parts of the country. And the previous discussion does not even address additional complications, such as to how to treat changes in the boundaries of Arbitron metros or of MAs. *See Notice* at ¶ 661. Indeed, given the large number of these mixed areas, the problems they pose may alone be sufficient grounds to reject the adoption of MAs as the market definition for radio in areas outside of Arbitron metros.[12]

[12] If the FCC were, however unwisely, to adopt MAs, NAB and Saga urge the FCC to deal with this "mixed" area problem by treating the entire MA (including both Arbitron metro and non-metro counties) as the relevant radio market. As shown in detail above, if the relevant radio market in a mixed MA is deemed to consist of *only* the non-metro counties, the result will be markets composed of geographically distant (and even non-contiguous) counties with stations that do not compete against each other, or even markets consisting of a single orphan county detached from the remainder of the MA. NAB and Saga also see no principled way to combine

3. MAs Do Not Reflect Actual Patterns of Radio Service.

Perhaps even more serious than the problems created by overlaps between MAs and Arbitron metros, MAs are not specifically related to the radio industry and, not surprisingly, do not reflect actual patterns of radio service. Consequently, the adoption of MAs would create highly anomalous radio markets.

OMB has expressly stated that it "establishes and maintains" the Metropolitan and Micropolitan Statistical Areas "solely for statistical purposes." 65 Fed. Reg. 82228 (Dec. 27, 2000). According to OMB, MAs "are not designed as a general purpose geographic framework for nonstatistical activities." *Id.* at 82236. Using MAs to define radio markets for purposes of applying the FCC's multiple ownership rules would be one of the "inappropriate uses" of MAs that OMB has explicitly cautioned against. *Id.* at 82228.

Among other anomalies, the use of MAs would result in the assignment of stations that actually compete against each other to separate markets, thereby understating the number of stations that should be regarded as being in the market. Because MAs are strictly county based, stations located in counties adjacent to an MA will never be counted as serving that MA because they are located outside the market. Radio signals, however, easily cross county borders, and

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some, but not all, of the Arbitron metro counties in mixed MAs with the orphan non-metro counties to form rational radio markets. The only alternative, then, would be to count all the stations in the MA (whether in non-metro or metro counties) when determining the number of stations in any mixed MA. Certainly stations in a non-metro county are likely to compete against stations located in adjacent counties in the MA, whether or not those adjacent counties in the MA are also included in an Arbitron metro. *See* Figure Two of *BIA Report*. And the fact that metro stations within an MA would, in essence, be treated as being in two markets (the MA for transactions involving stations located outside of Arbitron metros and the Arbitron metro for transactions solely involving metro stations) should not unduly disturb the FCC. After all, the FCC has already expressly approved of such "double counting" of stations. *See Biennial Review Order* at ¶ 280 and fn. 592 (a station will be counted as being in both the Arbitron metro in which its community of license is located, *and* in the metro that Arbitron designates as its "home" metro, if those metros differ).

stations located in a county outside, but adjacent to, an MA will often serve a substantial part (or even all) of the neighboring MA and compete for listeners and advertisers with stations located in the MA.

This understatement in the number of stations that actually serve an MA frequently occurs in the geographically small MAs comprised of one or two counties. For example, only three stations are licensed to the single county (Vance) that comprises the Henderson, North Carolina Micropolitan Statistical Area. However, many more stations actually serve the Henderson area. Figure Four of the *BIA Report* shows that the city-grade contours of eight additional stations, which are licensed to neighboring counties, cover part or *all* of the Henderson MA.[13] Accordingly, defining the relevant market as consisting only of the three stations licensed to the single county Henderson MA would substantially understate the number of stations actually serving listeners and competing for advertisers within that area.

The West Plains, Missouri Micropolitan Statistical Area similarly has only one county (Howell), with only seven stations licensed to it. But Figure Three of the *BIA Report* shows that the city-grade contours of at least six additional stations intersect Howell County. Again, defining the relevant radio market as consisting only of the seven stations licensed to the single county West Plains MA would understate the number of stations actually serving that area.

The Henderson and West Plains MAs are not, moreover, isolated examples. To the contrary, this "undercounting" problem with MAs is very significant, given the *hundreds* of MAs comprised of only one or two counties. *See BIA Report* at 8 (stating that 613 MAs have only one county and 149 have only two counties).

[13] In fact, it is likely that listeners in Vance County can receive an even greater number of stations because the use of city-grade contours is conservative in counting the number of stations receivable by listeners. Stations can generally reach listeners well beyond their city grade contours.

Beyond causing an understatement in the level of competition and diversity in many areas, this underestimation of the number of stations serving MAs would also make many existing radio station clusters noncompliant under the local radio ownership caps. *See BIA Report* at 8 (estimating about ninety situations where existing radio station groups would become noncompliant if MAs were used to define markets). For example, in the West Plains, Missouri Micropolitan Statistical Area, one radio company owns four of the seven stations licensed to the single county in that MA, and therefore would violate the local radio rule if the market were limited to stations licensed to that single county. As shown in Figure Three, however, at least six additional stations offer service to the West Plains MA.[14] If those six stations were also counted as being in the market, then the West Plains market would have at least 13 stations, and an existing cluster of four stations would be fully compliant with the ownership rules. *See* 47 C.F.R. § 73.3555(a).

It should perhaps not be surprising that the adoption of a geographic definition unrelated to radio service in the "real world" would make dozens of existing radio groups noncompliant under the local radio ownership limits. The Commission should be hesitant of adopting a new market definition that would throw large numbers of station owners out of compliance with the multiple ownership rules. Existing radio clusters were formed in good faith reliance on long-standing Commission policy toward defining radio markets and counting stations in them. The Commission also specifically found that the acquisition of the stations in each of these clusters

[14] Figure Three specifically shows the contours of only those out-of-county stations within 50 miles of the community of license for *one* of the seven stations located within the West Plains MA. *See BIA Report* at 8. Because our examination was limited to identifying out-of-county stations within that distance of just one of the stations within the West Plains MA, there are in all likelihood a number of additional stations located in adjacent counties that provide service to the West Plains MA.

served the public interest. A change in market definition now would upset the legitimate expectations of group owners and impair their ability to recoup their investments upon transfer.[15]

Certainly the Commission should not in this proceeding select a new market definition *because* it would make properly formed radio clusters noncompliant with the local radio ownership rule. Adopting a new market definition for the primary purpose of cutting back on the levels of local radio consolidation would be inconsistent with the clear deregulatory intent of the 1996 Telecommunications Act and the biennial review requirement.[16] Doing so without any evidence that these existing radio station groups are not serving the public would furthermore be entirely arbitrary.

In sum, because MAs fail to cover the entire U.S., overlap with Arbitron metros, are not consonant with actual patterns of radio service, and would create anomalous radio markets that

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[15] NAB has consistently argued that the owners of existing radio clusters made noncompliant by subsequent changes in market definition should be allowed to transfer their combinations intact. *See* Comments of NAB in MM Docket No. 00-244 at 29-31 (filed Feb. 26, 2001); MM Docket No. 01-317 at 49-51 (filed March 27, 2002). The Commission, however, determined in the *Biennial Review Order* (at ¶ 487) not to allow under most circumstances the transfer of station groups made noncompliant by the adoption of Arbitron metros.

[16] Under Section 202(h) of the 1996 Act, the Commission must review all of its ownership rules every two years to determine if they "are necessary in the public interest as the result of competition," and to "repeal or modify any regulation it determines to be no longer in the public interest." Pub. L. No. 104-104 § 202(h), 110 Stat. 56 (1996). As NAB has explained in detail in previous ownership comments, Congress had a deregulatory intent when adopting the 1996 Act and Section 202(h). The 1996 Act was intended to "promote[] competition and reduce[] regulation," and Congress expressly sought to "promote the competitiveness" of broadcast stations in a multichannel media market by "depart[ing] from the traditional notions of broadcast regulation" and "rely[ing] more on competitive market forces." H.R. Rep. No. 204, 104th Cong., 2d Sess. 47-48, 55 (1995). In interpreting Section 202(h) specifically, the D.C. Circuit Court of Appeals has found that the biennial review provision was designed "to continue the process of deregulation." *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 159 (D.C. Cir. 2002), *quoting Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1033 (D.C. Cir. 2002).

frequently undercount the number of stations serving the market, the Commission should reject these pre-defined geographic areas for defining radio markets.

B. Cellular Market Areas Also Suffer from Many Serious Drawbacks.

The Commission adopted Cellular Market Areas for the licensing of cellular service. A number of these CMAs corresponded to Metropolitan Statistical Areas, as defined by OMB following the 1980 census, but those covering less populated areas were defined by the Commission.[17] Like the Metropolitan/Micropolitan Statistical Areas discussed in Section I.A., CMAs suffer from a variety of problems that make them inappropriate for defining radio markets outside of Arbitron metros.

1. Many Areas of Overlap Between CMAs and Arbitron Metros Create Virtually Insoluble Problems with Market Definition.

Just as with MAs, a large number of CMAs contain multiple counties, some but not all of which are included in Arbitron metros. In fact, 148 CMAs are "mixed" – an even larger number than with MAs. *See BIA Report* at 14. This higher number of mixed CMAs containing some counties that are also within metros would make defining coherent and rational radio markets based on CMAs even more difficult, and would complicate the most basic questions of market definition, including determining the number of stations counted as being in the market.

For example, Figure Six of the *BIA Report* shows the Louisiana-5 CMA, which contains four parishes that are part of an Arbitron Metro[18] and six parishes that are outside of any metro. This figure also shows the service contours of a number of radio stations whose communities of license are located in non-metro parishes within the Louisiana-5 CMA. Clearly, the Louisiana-5

[17] These rural markets created by the FCC are also referred to as Rural Service Areas.

[18] To complicate matters further, these four metro parishes are not all included in the same metro. Acadia, St. Landry and Vermilion are part of the Lafayette Arbitron metro, while Pointe Coupee is in the Baton Rouge metro.

CMA cannot be regarded as a single radio market. The contours of the stations in the western parishes of the CMA do not come close to overlapping those of stations in the northern or eastern parishes of the CMA. Thirteen pairs of stations licensed to this CMA are over 100 miles away from each other. *BIA Report* at 15. Consequently, listeners across the CMA cannot receive many of the same stations, and advertisers located in the western, northern or eastern parishes of the CMA are likely uninterested in reaching listeners in the other areas.

The six non-metro parishes in this CMA would not constitute a rational radio market by themselves either. These six parishes roughly circle the western and northern borders of the CMA's metro parishes, and, as a result, the stations in the non-metro parishes are widely separated and are unlikely to compete against each other. In fact, stations located in non-metro parishes in the western part of the CMA are far more likely to compete against stations located in adjacent parishes (whether those parishes are inside or outside the CMA or any metro) than they are to compete against stations located in the northern non-metro parishes of the CMA. Treating the six non-metro parishes of the Louisiana-5 CMA as a separate market would be completely nonsensical.

Thus, the 148 mixed CMAs raise the same intractable problems with defining a rational radio market, as previously described in relation to MAs. If the relevant radio market in each mixed CMA is deemed to consist of *only* the non-metro counties within the larger CMA, one anomalous result will be markets consisting of a single "orphan" county detached from the remaining counties in the CMA (which are all in Arbitron metros).[19] In these CMAs consisting

[19] A number of CMAs contain multiple metro counties and only one non-metro county. *See* Appendix Two of *BIA Report* (Atlanta, GA; Denver-Boulder, CO; Evansville, IN-KY; Lansing-East Lansing, MI; Macon-Warner-Robins, GA; North Carolina-14; Roanoke, VA; and Toledo, OH-MI).

of multiple metro counties and only one non-metro county, the single orphan county would rarely, if ever, constitute a rational radio market standing alone.

Many other CMAs consist of roughly equal numbers of Arbitron metro and non-metro counties. If the relevant radio market in these areas were deemed to consist of only the non-metro counties, then the result would likely be markets composed of geographically distant counties with little relation to each other and containing stations that do not compete with each other for either listeners or advertisers.[20] Assuming that the non-metro counties in CMAs should not, by themselves, be treated as separate radio markets, the Commission would be forced to develop some criteria for determining which other counties (and stations) from the CMAs should be added to the non-metro counties (and stations) to create markets that accurately and consistently reflect radio service. This problem of overlapping CMAs and Arbitron metros is even further complicated by the fact that some CMAs (such as Louisiana-5) contain counties from *multiple* metros, as well as non-metro counties.[21] Given the large numbers of these mixed CMAs and the virtually insoluble problems in defining rational and coherent radio markets that they present, the Commission should reject this alternative for defining radio markets outside of Arbitron metros based on the "overlap" question alone.

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[20] As described above, the Louisiana-5 CMA illustrates this problem. A number of other CMAs identified in Appendix Two similarly consist of roughly equivalent numbers of metro and non-metro counties, and the removal of the Arbitron metro counties from these CMAs would be unlikely to result in coherent radio markets. *See* Appendix Two of *BIA Report* (Arkansas-4; Georgia-5; Iowa-13; Kansas-5; Kentucky-7; Maryland-2; Mississippi-2; Mississippi-4; New York-2; North Carolina-9; North Carolina-15; Virginia-4; Virginia-10; Virginia-11 and West Virginia-3).

[21] If the FCC were, however unwisely, to adopt CMAs to define radio markets, then the only practicable alternative would be to count all the stations in the CMA (whether in non-metro or metro counties) when determining the number of stations in any mixed CMA. *See* discussion in note 12 above.

2. CMAs Bear No Relation to the Radio Industry and Fail to Reflect Actual Patterns of Radio Service.

But beyond the difficulties posed by overlapping CMAs and Arbitron metros, CMAs – which were developed to license cellular service – clearly bear no relation to the radio industry. As a result, CMAs are not consonant with actual patterns of radio service, and their adoption would produce highly anomalous radio markets for the variety of reasons described in detail below.

CMAs are inappropriate for defining radio markets, in part due to their size.[22] Seventeen CMAs cover more than 20,000 square miles in area. *BIA Report* at 12. Due to their large size, many CMAs include stations that are separated by considerable distances and that cannot be regarded as competing with each other. For example, Figure Five of the *BIA Report* shows the Oregon-6 CMA and the service contours of the radio stations licensed to that CMA's five counties. These radio stations are not scattered throughout this CMA, but are concentrated around four towns (Bend, Klamath Falls, Burns and Lakeview) within the CMA. The stations clustered around each of these four towns compete with each other, but not with the stations clustered around the other towns.[23] In fact, 17 pairs of stations in this CMA are located more than 100 miles from each other. *BIA Report* at 14. Given the size of the Oregon-6 and many other CMAs, utilizing these cellular markets would produce completely irrational radio markets containing stations that do not, in actuality, compete against each other for listeners or advertisers. Common ownership of stations in widely separated communities, such as Bend and

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[22] On average, CMAs comprise 4.4 counties covering 4,915 square miles. But there is wide variation, with one CMA (New York, NY-NJ) having 17 counties and another CMA (Alaska-1) encompassing over 340,000 square miles. *BIA Report* at 12.

[23] Figure Five clearly shows that the service contours of the stations around Bend, for example, do not come close to intersecting with the contours of the stations around Klamath Falls, Lakeview or Burns (and vice versa).

Klamath Falls, could not raise any questions under the Commission's competition or diversity policies, but the use of CMAs to establish radio markets would irrationally raise questions under the local radio ownership limits in these circumstances.

CMAs also fail to reflect actual radio service because many of these pre-defined markets do not cross state borders. The CMAs that correspond to Metropolitan Statistical Areas defined by OMB can, and in many cases do, cross state boundaries. The CMAs defined by the Commission to "fill in" the areas of the country not covered by Metropolitan Statistical Areas all stop at state boundaries. *BIA Report* at 17. Thus, the ability of CMAs to reflect radio service accurately may vary substantially from one CMA to another. This inconsistency in the treatment of state boundaries between different CMAs will undoubtedly produce anomalies in the definition of radio markets.

The CMAs that are restricted by state boundaries will, in many cases, understate the number of stations that actually compete in particular CMAs. Figure Seven of the *BIA Report* illustrates the potential impact that state boundaries can have on understating the number of competing radio stations in a market. This figure of the Massachusetts-1 CMA shows that three stations located outside the CMA in New Hampshire and Vermont offer service to significant parts of that CMA. In counting the stations that compete in the Massachusetts-1 CMA, those three out-of-state stations should be included along with the nine stations whose cities of license are located in that CMA. In addition, ten more stations in neighboring Massachusetts counties have city-grade contours that intersect the Massachusetts-1 CMA. *BIA Report* at 17. Thus, CMAs (like MAs) will fail to reflect the full number of radio stations that actually serve an area because they are restricted by county boundaries as well.

As discussed above in connection with MAs, pre-defined market designations that are strictly county-based are unable to take account of radio stations located in adjacent counties, even though radio signals easily cross county borders and stations located outside, but adjacent to, a pre-defined geographic market will often serve a substantial part (or even all) of that market.[24] In the *Notice* (at ¶ 658), the Commission appeared to recognize that, at least on occasion, counties should be split to define radio markets more accurately, but both CMAs and MAs are strictly defined along county lines. Examination of yet another market reemphasizes the impact that county boundaries alone can have on understating the number of competing radio stations in a market. Fourteen radio stations are licensed to communities in the counties comprising the Missouri-16 CMA. *BIA Report* at 19. However, any stations located in other counties adjacent to the Missouri-16 CMA, and that may well serve that market, are not counted because CMAs do not cross county boundaries. Figure Eight of the *BIA Report* shows that the city-grade contours of *at least* five additional stations intersect the Missouri-16 CMA.[25] Therefore, instead of only 14 radio stations, the Missouri-16 CMA is actually served by *at least* 19 stations.

This undercounting of the actual number of stations that serve an area would furthermore have a significant adverse impact on the radio industry. For example, in the Missouri-16 CMA, one group owner currently owns four FM stations. *Id.* at 19. If CMAs were adopted to define radio markets, then that group owner would exceed the local ownership caps because only 14

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[24] *See* Section I.A.3., discussing the Henderson, North Carolina and West Plains, Missouri MAs.

[25] Figure Eight specifically shows the contours of only those out-of-market stations within 40 miles of *one* of the 14 fourteen stations located in the Missouri-16 CMA. *See BIA Report* at 19. Because our examination was limited to identifying out-of-market stations close to just one of the stations within the Missouri-16 CMA, there are in all likelihood a number of additional stations located in adjacent counties that provide service to the Missouri-16 market.

stations are licensed to communities in the Missouri-16 CMA. If, however, all stations that actually serve the Missouri-16 CMA were counted (which totals at least 19), then that existing radio cluster would be fully compliant with the local radio rules. The fact that adoption of CMAs would make large numbers of existing radio groups, which were properly formed in good faith reliance on long-standing Commission policies, noncompliant under the multiple ownership rules should make the Commission hesitant to use CMAs to define radio markets. *See* Section I.A.3. (similar discussion in the context of MAs).

In sum, the empirical evidence shows that CMAs are in no way appropriate for defining radio markets. Indeed, even before any empirical analysis, the Commission should have had no realistic expectation that markets created for the awarding of licenses in a wholly unrelated industry would be appropriate for defining radio markets. For example, in defining markets for the granting of cellular licenses, the Commission evidently wanted to encourage licensees to provide continuous cellular telephone service along major roads, and it specifically modified a number of CMAs to follow highways.[26] Even in the absence of a detailed empirical analysis of multiple CMAs, the Commission could have had no reasonable basis for assuming that markets formed to promote continuous cellular service along highways would also be consonant with the provision of radio service to population centers.

Unsurprisingly, the evidence demonstrates that cellular markets formed along highways are not in fact consonant with radio service provided to communities. Figure Nine of the *BIA Report* shows the Kentucky-4 CMA, which was evidently formed to follow several state

[26] *See Order on Reconsideration*, Appendix C, CC Docket No. 85-388, RM 5167, 2 FCC Rcd 3366 (1987) (modifying markets in Indiana to "allow for continuous coverage along U.S. Hwy #64," markets in Michigan to "allow for continuous coverage of Rt. 22," and markets in Minnesota to "better serve Highway 10" and to permit "more efficient service to corridors of Highways 65 and 169").

highways (shown in green). A single radio group owns 12 stations within that CMA, and it would exceed the local radio limits if the CMA were regarded as the relevant market. However, those 12 stations are actually clustered in three separate areas, and the city-grade contours of the stations in any one of the three areas do not overlap the city-grade contours of stations serving the other two areas.[27] These stations should therefore not be regarded as competing against each other and should not all be included in the same market.

This Kentucky-4 CMA, along with all the other markets examined in the *BIA Report*, demonstrate that pre-defined geographic markets are fundamentally unsuited for defining radio markets for purposes of applying the Commission's multiple ownership rules. The Commission cannot simply pluck some pre-defined geographic areas – whether CMAs, MAs or, for that matter, congressional districts – "out of thin air" and proclaim them to constitute radio markets.

C. Center of Commerce Areas Also Proved to be Unsatisfactory Proxies for Radio Service.

Because MAs and CMAs proved to be totally unsatisfactory for defining rational and coherent radio markets, NAB, with assistance from BIA, examined the possibility of developing a different geographic market definition that would reflect the way that radio stations operate to sell advertising time. Specifically, this approach involved identifying the "center of commerce" in every area, and then attempting to identify the stations that compete for advertisers located in each center.

As the first step in developing these Center of Commerce Areas ("COCAs"), BIA identified the most populous town in each of the approximately 2200 counties that are not included in any Arbitron metro. Assuming that the radio stations surrounding these population

[27] For example, the stations in Green and Taylor counties in the southern part of the CMA do not serve the same area as the stations in Hardin and Larue counties, which are located to the west and north.

centers would focus their advertising sales efforts on businesses located there, all radio stations within certain maximum distances of each identified center were assigned as serving the COCA formed around that center.[28] Stations that were not within the specified maximum distances of any population center were assigned as serving the COCA formed around their home county's most populous town, so that all radio stations in the U.S. would be assigned to at least one COCA. *See BIA Report* at 23-25.[29]

Despite our hopes, COCAs also proved to be unsatisfactory for defining radio markets in a consistent and accurate manner. As an initial matter, there were difficulties in selecting appropriate and defensible maximum mileage standards, especially for AM stations. After examining a number of AM contours, which vary widely in size and shape, we simply assumed a 30-mile maximum distance standard for assigning AM stations to markets. And even with FM stations, the use of uniform maximum distances to determine the number of competitive radio stations in every COCA is problematic because the distances actually served by FM stations can vary in different regions of the country, in part due to local terrain. *See id.* at 27.

Potential problems also arose in the assumption that radio stations located farther than the specified maximum distances from any population center should automatically be assigned as serving the COCA formed around their home county's most populous town. Many counties outside of Arbitron metros are quite large, and they contain stations distantly located from the

[28] The distances for FM stations correspond to FCC rules for maximum coverage patterns with respect to the power and antenna heights associated with each class. *See* 47 C.F.R. § 73.211(b). All AM stations within 30 miles of an identified town were regarded as serving the COCA centered around that town. All stations within these maximum distances of an identified population center were assigned as serving the COCA, even if they were located in another county or another state. *See BIA Report* at 24.

[29] Stations could be assigned to two or more COCAs, if they were located within the specified maximum distances from two or more population centers.

population centers identified as the "center of commerce" in those counties. For example, Figure Ten of the *BIA Report* shows the Otter Tail, Minnesota COCA. One station (KPRW-FM) is licensed to a community in the northeast part of this county, and it exceeds the maximum distance from the county's city of commerce. In fact, as shown by the contours of all the stations serving the Otter Tail COCA, KPRW does not appear to compete in any significant way with the other stations assigned to that COCA (which surround the center of commerce location considerably to the west). KPRW was, nonetheless, assigned to the Otter Tail COCA because its community of license is located in that county.

Perhaps most seriously, the COCA approach became a *de facto* county-by-county approach, with each county's most populous town becoming the center of a separate COCA, even though in many cases counties should undoubtedly be combined together to form markets that more accurately reflect radio service and the selling of advertising time. But NAB and BIA could find no criteria for combining counties into markets that would, on a consistent and rational basis, reflect the actual radio marketplace.[30]

Treating all centers of commerce as though they were limited to a single county has the practical effect of underestimating the total number of radio stations counted as being in the relevant market. A more accurately calibrated center of commerce approach, in a number of areas, would have to combine more than one county and/or more than one city or town into markets, thereby increasing the number of stations counted as being in the same market. As discussed above, we were unable to devise a rational method for doing this. One adverse

[30] This difficulty with COCAs highlights related problems with MAs and, especially, CMAs. These other county-based geographic areas are comprised of counties combined into markets based on criteria having little or nothing to do with radio service. As discussed in Section I.B.2., for example, at least some CMAs were formed by combining counties that stretched along major roads so as to encourage the provision of continuous cellular service along highways.

practical consequence of utilizing single county COCAs would be throwing many existing radio clusters out of compliance with the local ownership caps, without any basis for concluding that those station groups have any adverse impact on competition or diversity. *See id.* at 25-26.

To develop a county-based center of commerce approach truly reflective of the radio marketplace, one would need reliable, radio-related criteria for determining when (1) a county should stand alone as a market; (2) counties should be combined to form markets; and (3) counties should be split into separate markets. *See Notice* at ¶ 658 (seeking comment on circumstances under which counties should be divided into separate radio markets).[31] In the absence of such criteria, NAB and Saga are forced to conclude that COCAs, like MAs and CMAs, fail to delineate radio markets accurately, reliably and consistently. Even assuming that this center of commerce approach is not undermined by difficulties in arriving at the maximum distance standards and in assigning stations that exceed those distances to particular markets, the problems with combining counties into markets appear insurmountable.

D. Sufficient Data Do Not Exist to Create Markets Based on Actual Radio Listening Patterns.

NAB and BIA also examined the possibility of creating geographic radio markets based on actual audience listening patterns. Such an approach had an intuitive appeal because – unlike MAs and CMAs – it at least related to the radio industry. This approach, however, floundered at the outset due to many problems with the limited available data.

As explained in detail in the *BIA Report* (at 29-31), Arbitron prepares annual reports for each state, which provides county-by-county audience estimates for radio stations receiving a

[31] Nielsen uses actual television viewing patterns of consumers to make similar types of determinations for its Designated Market Areas ("DMAs"). We are unaware of any useable and statistically reliable information on radio listening patterns that would enable such determinations to be made for radio, especially in non-metro areas. *See* Section II.D. below.

minimum listening level in all counties located outside of Arbitron metros. Given this county specific information on audience listening, a geographic market for radio may theoretically be constructed using the location of the radio stations receiving the majority of the listening for specific counties. Individual counties would be combined into markets with adjacent counties depending upon these listening patterns, similar to the methods used by Nielsen Media Research in formulating their county-based DMAs.

After careful review of the Arbitron county-by-county data, it is clear that these data are not sufficiently robust to be utilized in this manner. As an initial matter, there were problems in even analyzing the Arbitron county-by-county data. The data are part of a proprietary program, which makes it very difficult to conduct the independent analyses necessary for attempting to define relevant radio geographic markets. *See BIA Report* at 29. The data also suffer from reliability problems so severe that *no* statistical reliability measures for these audience estimates can be determined.[32]

These reliability problems with the Arbitron county-by-county data stem in large part from the extremely small numbers of in-tab diaries upon which these audience estimates are based.[33] If there are no in-tab diaries at all from a particular county, then that county is simply not reported in Arbitron's county-by-county report. And if there are fewer than 30 in-tab diaries

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[32] Even Arbitron itself acknowledges in the county-by-county reports that the "reliability of audience estimates cannot be determined to any precise mathematical value" and that the "statistical reliability of the information may vary from county to county." *BIA Report* at 30.

[33] Due to the very small number of correctly entered and returned diaries (referred to as in-tab diaries) in many non-metro counties, stations must be mentioned in only three diaries to meet the minimum listening level to be reported in Arbitron's annual county-by-county report. In contrast, the minimum number for one of the quarterly or semiannual reports for metro counties is ten in-tab diaries. Given the very low number of in-tab diaries returned from many non-metro counties, stations could easily be reported as part of a county one year but not the next, due solely to losing *one* reference in the in-tab diaries.

from a county, Arbitron combines that county's listening with one or more contiguous counties that may or may not have 30 in-tab diaries. *Id*. at 30. These reporting practices by Arbitron would make it even more difficult to utilize the county-by-county data to combine counties into coherent radio markets based on actual listening patterns.

And as with the center of commerce approach discussed above, many potential problems exist with using the county-based Arbitron data to determine appropriate criteria for establishing the geographic boundaries of markets and identifying the stations that should be included in those markets. Standards for determining when counties should be combined into markets that consistently and accurately reflect radio service will be extremely difficult, especially in light of the serious problems with even conducting independent analyses of Arbitron's proprietary data. In sum, NAB and Saga do not believe that Arbitron county-by-county audience information can be used to formulate radio geographic markets based on actual audience listening patterns.

II. The Commission Should Retain A Contour Overlap Approach For Defining Radio Markets In Areas Not Located In Arbitron Metros.

As discussed in detail in Section I., pre-defined geographic markets do not reflect radio service in a consistent, predictable or accurate manner. Indeed, it seems unrealistic to expect geographic markets such as MAs and CMAs – which are wholly unrelated to the radio industry – to be in any way suitable for defining radio markets. Given the demonstrable insufficiencies of pre-defined geographic markets as proxies for radio markets, the Commission should retain its contour overlap approach (as modified in the *Biennial Review Order*) to define radio markets in non-metro areas.[34] For all the reasons set forth below, the retention of contours as the basis for defining markets is the only viable, practical alternative.

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[34] Under this approach, which the FCC adopted in 1992, radio markets are defined by utilizing the principal community contours of the radio stations proposed to be commonly owned in

A. Contours Reflect Radio Service in the Real World and Operate to Define Markets Appropriately Across Widely Varying Geographic Areas.

Despite the risk of belaboring the obvious, NAB and Saga emphasize that the contour overlap approach is the only known method of defining radio markets in *non-metro* areas that actually relates to radio. Although NAB and Saga opposed (and continue to oppose) the adoption of Arbitron metros as the radio market for purposes of applying the multiple ownership rules, at least Arbitron relates to radio.[35] Despite the deficiencies of Arbitron data and market definitions as regulatory tools, the ratings information provided by Arbitron is widely used by radio advertisers. In stark contrast, MAs and CMAs are not used by radio station owners, advertisers or anyone else connected with the radio industry in any way. Thus, on its face, the replacement of a radio-specific market definition methodology with a market definition totally unrelated to the industry being regulated would seem to epitomize arbitrary and capricious rulemaking.[36]

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specific transactions. The Commission looks to all stations that will be commonly owned after a proposed transaction is consummated, and considers stations to be in the same market if they have mutually overlapping signal contours.

[35] *See* Comments of NAB in MM Docket No. 00-244 at 13-24 (filed Feb. 26, 2001) (arguing that Arbitron data and market definitions lack the neutrality and consistency needed for a regulatory tool to be used by the Commission); Petition for Review of NAB, D.C. Circuit No. 03-1232 (filed Aug. 6, 2003) (challenging, *inter alia*, FCC's treatment of local radio rules in *Biennial Review Order*); Petition for Partial Reconsideration of Saga in MM Docket No. 02-277 (filed Sept. 4, 2003) (requesting reconsideration of FCC's decision in *Biennial Review Order* adopting Arbitron to define radio markets).

[36] *See, e.g.*, *Tanners' Council of America, Inc. v. Train*, 540 F.2d 1188, 1193 (4th Cir. 1976) (in developing waste treatment standards for the tannery industry, EPA acted arbitrarily in transferring waste treatment performance standards from the meat-packing industry); *Hooker Chemicals & Plastics Corp. v. Train*, 537 F.2d 620, 636 (2d Cir. 1976) (court remanded EPA regulations, where agency failed to explain how a particular pollution control technology could be adopted to the phosphate manufacturing industry, "given the distinctions between that industry and the other chemical industries in which that technique is presently employed").

Not only do contours relate to radio, defining markets in terms of contour overlap also effectively identifies radio stations with the potential to compete against each other. Radio stations vary widely in their signal strength and, consequently, in their coverage areas. Compared to television stations, which are concentrated in or near population centers, radio stations are much more scattered in location.[37] These characteristics of radio stations make it difficult to find a pre-defined geographic market that accurately reflects radio service. For example, a Gaithersburg, Maryland station with a powerful signal and large coverage area may be a competitor for advertising and listeners with a radio station located in the District of Columbia, even though the signal of that D.C. station does not reach Gaithersburg. In addition, there may be a smaller, less powerful station in Gaithersburg that serves only its immediate area and that provides competition for the large Gaithersburg station only within Gaithersburg (and which does not compete at all with the District of Columbia station). Still another radio station licensed to Gaithersburg may serve nearby Maryland communities such as Frederick, and provide competition to stations located in and primarily serving Frederick.

Given the scattered location of stations and their widely varying signal strength and coverage areas, defining radio markets in terms of contour overlap will more accurately and consistently identify radio stations that actually compete with one another than utilizing any pre-defined geographic market unrelated to radio. Certainly if the contours of two radio stations overlap, then those stations should be regarded as having the potential for competing against

[37] In fact, the Commission's own policies have contributed to the widely scattered location of radio stations. Pursuant to its mandate under Section 307(b) of the Communications Act, the Commission for decades granted preferences in comparative hearings to radio station applicants who proposed to establish the first radio service in a community. *See* 47 U.S.C. § 307(b) (Commission shall distribute licenses fairly and equitably "among the several States and communities").

each other for advertising and for listeners, particularly within the overlap area. Especially in comparison to the alternatives proposed in the *Notice*, the contour overlap approach will more accurately reflect the "actual options available to listeners" and "market conditions facing the particular stations in questions."[38] NAB and Saga moreover emphasize that a "standard based upon the existence of overlapping principal community contours" (rather than the more expansive protected contours) is "conservative in counting the number of stations receivable by listeners," particularly in rural areas not located in Arbitron metros. *Report and Order* in MM Docket No. 91-140, 7 FCC Rcd 2755, 2779 (1992) ("*1992 Radio Order*").[39]

Furthermore, unlike pre-defined geographic areas, a contour-overlap approach is sufficiently flexible to work equally well across widely varying geographic areas. County-based geographic market definitions are particularly deficient in accounting for differences in radio service and markets between the relatively urbanized East, with geographically small counties, and the more rural West, with large counties. *See Notice* at ¶ 658 (inquiring under what circumstances large counties in the West should be divided into separate radio markets). Any geographic market definition based on counties will therefore produce inevitable anomalies in defining radio markets due to the great variation in the size of counties alone.[40] NAB and Saga

[38] *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking* in MM Docket No. 91-140, 7 FCC Rcd 6387, 6395 (1992) ("*1992 MO&O*") (concluding that contour overlap method of defining radio markets "address[ed] our core concerns of competition and diversity").

[39] In rural areas where there were relatively few stations, and thus relatively low levels of daytime interference, the Commission has explained that listeners would likely be able to receive AM and FM signals beyond the predicted contours. "Hence, there are likely to be more signals available to the average listener in such a market than the number of signals that would be counted by this methodology. The level of competition is therefore likely to be higher than the overlap numbers might suggest." *1992 Radio Order*, 7 FCC Rcd at 2779.

[40] For example, the Wyoming-3 CMA contains seven counties but covers nearly 43,000 square miles. In contrast, the Virginia-5 CMA also contains seven counties but covers less than 1600

moreover observe that county size and boundaries historically have been manipulated for political or similar purposes so that many counties do not necessarily reflect general economic or even demographic realities.[41] Particularly in light of the less than rational nature of many county boundaries, no county-based geographic definition can reflect actual radio service as accurately and consistently as a contour-based approach.[42] In sum, a contour overlap approach is vastly superior to a non-radio related geographic approach in accounting for the vast variation in signal strength and service areas among radio stations and in the size and geographic characteristics of counties.

B. Rejecting Contours in Favor of a Non-Radio Related Geographic Market Definition that Creates Irrational Radio Markets Would Be Arbitrary and Capricious.

In the *Notice of Proposed Rulemaking* initiating its reexamination of its method of defining radio markets, the Commission could only identify two specific anomalies that occurred with any frequency when utilizing its long-standing contour overlap approach.[43] NAB and Saga

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square miles. County-based markets of such widely disparate size are highly unlikely to consistently reflect actual patterns of radio service.

[41] *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 575 (1964) (in a case challenging a state's legislative apportionment on civil rights grounds, Supreme Court stated that counties are "subordinate governmental instrumentalities created by the State" and that their "number," "nature," "powers" and "territory" rest "in the absolute discretion of the State").

[42] Sections I.A.3. and I.B.2. discussed in detail how MAs and CMAs often understate the number of radio stations serving an area because stations located in counties adjacent to the MA or CMA, and which provide service to much of that MA or CMA, are simply ignored. Section I.B.2. also described how many CMAs are similarly artificially restricted by state boundaries.

[43] *See Notice of Proposed Rulemaking* in MM Docket No. 00-244, FCC 00-427 at ¶¶ 5, 8, 12 (rel. Dec. 13, 2000) identifying: (i) the numerator/denominator or "Pine Bluff" problem, which involves an apparent inconsistency between the methodology used for counting the number of stations in a market (the "denominator") and the number of stations that an entity is deemed to own in that market (the "numerator"); and (ii) the increase in the number of stations regarded as being in a market by the counting of "distant" signals that overlap only the largest contour among the stations whose contours define the market.

note that this market definition *Notice* lacked any information as to the actual scope of even these anomalies, especially in comparison to the thousands and thousands of station transfers that have occurred since 1992. But regardless of the actual scope of the problem presented by these two anomalies, the Commission has already adjusted its contour overlap methodology to correct the "problematic aspects" of that methodology. *Biennial Review Order* at ¶ 285 (excluding from the denominator radio stations that are commonly owned with stations in the numerator, and excluding from the market any "distant" radio station whose transmitter site is more than 58 miles from the mutual overlap area). NAB and Saga therefore see no pressing need for the Commission to replace this adjusted contour overlap approach with a pre-defined geographic market definition, especially one unrelated to radio.

Certainly the adoption of an altered market definition for the primary purpose of cutting back on the levels of consolidation in local radio markets would be highly problematic. Although the Commission has expressed concern that its contour overlap methodology results in markets that are simply "too big,"[44] it would be completely inappropriate for the Commission to adopt in this proceeding a county-based geographic definition that consistently *understates* the actual size of radio markets. The Commission should not violate clear congressional intent by consciously cutting back on the level of consolidation expressly permitted in the 1996 Act through the adoption of a market definition that frequently understates the size of local markets. *See* Sections I.A.3. and I.B.2. above. As Chairman Powell wrote when the Commission initiated its proceeding on radio market definition, the Commission should "avoid using the rulemaking

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[44] *See Biennial Review Order* at ¶ 258 (contending that contour overlap approach may overstate the size of radio markets by including stations "too distant" to serve either listeners or advertisers effectively). As described above, the Commission has already acted to address this concern by adjusting its contour overlap approach to exclude from the market certain distantly located radio stations.

process as a means to circumvent specific statutory provisions and effectuate a different result than Congress intended."[45]

Finally, theoretical antitrust concerns about the contour overlap approach for defining radio markets do not justify the adoption of a geographic market definition bearing no relation whatsoever to the industry at issue. *See Biennial Review Order* at ¶ 256 (determining to replace the contour overlap methodology with Arbitron metros in part because defining radio markets in terms of the outlets proposed to be commonly owned in particular transactions was a "singular and unusual" method for determining the size of a market, which did not comport with "traditional antitrust principles").

As an initial matter, NAB and Saga wonder why this concern should be the controlling factor in the FCC's selection of a radio market definition in areas outside of Arbitron metros. The Commission is not, after all, the Antitrust Division of the Justice Department, and it usually takes factors other than antitrust-related ones into account when making policy decisions. *See 1992 MO&O*, 7 FCC Rcd at 6395 (contour overlap method of defining radio markets "address[ed] our core concerns of competition and diversity"). And the precise relevance of the "singular" or "unusual" nature of the contour overlap methodology for defining markets remains unclear. As discussed in detail in Section II.A., this "singular and unusual" method is entirely appropriate for defining markets in the radio industry, given the scattered location of stations and their widely varying signal strength and coverage areas. Obviously a one-size-fits-all, pre-defined geographic market, such as MAs or CMAs, cannot account for these unique

[45] Concurring Statement of Commissioner Michael K. Powell, *Notice of Proposed Rulemaking* in MM Docket No. 00-244, FCC 00-427 (rel. Dec. 13, 2000).

characteristics of radio stations.[46] Indeed, one wonders how a geographic market definition that is *wholly unrelated to the radio industry* can be thought to be "in line with coherent and accepted methods" for determining the dimensions of a market for purposes of analyzing competition *within that industry*. *Biennial Review Order* at ¶ 256.

NAB and Saga strongly doubt that the Justice Department would utilize a pre-defined geographic area unrelated to the radio industry to define the geographic market when examining proposed radio transactions in areas outside of Arbitron metros. In the absence of a geographic market definition recognized by the radio industry, the Antitrust Division of the Justice Department would in all likelihood define a geographic market for radio transactions based on the "geographic coverage of broadcast signals" and "customer demand."[47] The Justice Department has expressly recognized that examining the "contour maps of stations' signal strength" is relevant and appropriate in determining the geographic market for evaluating proposed radio station transactions. Comments of Justice Department, *Tallahassee Broadcasting* at 8; *Triathlon Broadcasting* at 9. Clearly, the Commission should not jettison its long-standing reliance on "contour maps of stations' signal strength" based on an erroneous belief that the mere consideration of station contours is somehow inherently contrary to accepted antitrust principles when attempting to define a geographic market for radio.

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[46] *See* Sections I.A. and B. (showing that these geographic markets do not accurately reflect patterns of radio service and produce anomalous radio markets).

[47] Comments of Department of Justice, Antitrust Division, *In re Application of Tallahassee Broadcasting Co.*, File No. BALH-980911GE at 8 (filed Nov. 16, 1998); *In re Application of Triathlon Broadcasting Co*., File Nos. BTC-980821EE, BTC-980821EF, BTC-980921EG, BTCH-980821EH, BTCH-980821EI, and BTCH-980821EJ at 9 (filed Oct. 19, 1998). In these comments to the FCC, the Justice Department identified three factors as "especially relevant in determining the relevant geographic market" for a proposed radio transaction – "industry recognition" (*i.e.*, Arbitron/BIA); the "geographic coverage of broadcast signals"; and "customer" (*i.e.*, advertiser) "demand."

NAB and Saga further observe that the two market definitions proposed in the *Notice* – Metropolitan/Micropolitan Statistical Areas and Cellular Market Areas – are completely inconsistent with the three factors identified by the Antitrust Division as "especially relevant in determining the relevant geographic market" for "assess[ing] the competitive effects" of proposed radio acquisitions. *Id.* First, MAs and CMAs lack any "industry recognition" whatsoever. *Id.*[48] Second, MAs and CMAs bear little relation to the "geographic coverage of broadcast signals." *Id.* Third, MAs and CMAs are wholly unrelated to "customer demand," *id.*, as advertisers do not rely upon these geographic definitions in deciding how to reach their target audiences or in determining the radio stations on which to advertise. Rather than being "in line with coherent and accepted methods" for determining the relevant geographic market in assessing radio transactions, *Biennial Review Order* at ¶ 256, the pre-defined geographic areas proposed by the Commission are in fact wholly inconsistent with these "methods," as set forth by the Antitrust Division of the Justice Department.

In sum, the Commission has no basis for rejecting its long-standing contour overlap approach to defining markets in areas outside of Arbitron metros, especially in light of the recent adjustments to that methodology correcting the only two anomalies that have been shown to occur with any frequency. On the available evidence, the Commission simply cannot make a "reasoned analysis" for "change."[49] Indeed, replacing its adjusted contour overlap approach with

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[48] As noted in Section II.A., Arbitron, for all its drawbacks as a regulatory tool, at least relates to radio, and is utilized by radio advertisers. MAs and CMAs are not used by the radio industry for any purpose of which NAB and Saga are aware.

[49] *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 42 (1983) ("an agency changing its course . . . is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance"). *See also ACT v. FCC*, 821 F.2d 741, 746 (D.C. Cir. 1987) (court found that FCC had failed to establish "the requisite 'reasoned basis' for altering its long-established policy" on certain television commercial limits).

a geographically-defined market that does not relate in any way to radio and that consequently produces demonstrably anomalous and irrational results in defining radio markets would clearly constitute arbitrary and capricious decision-making by the Commission. After all, if the Commission rejects a "time-tested traditional procedure" and replaces it with a new procedure, then the Commission must be able to show that this "new procedure is superior" because, "if not, why the change?"[50] And in light of the results of the extensive research conducted by NAB and BIA, the Commission will be unable to show that the adoption of MAs or CMAs (or any other pre-defined geographic market unrelated to radio) is "superior" to the "time-tested" contour overlap approach to defining radio markets. *Mountain States*, 939 F.2d at 1034. Certainly theoretical reservations about the singularity of the contour overlap method of defining radio markets cannot "outweigh[]" the empirically demonstrated "disadvantages" of adopting a non-radio related market definition such as CMAs or MAs.[51] Given the empirical evidence demonstrating that geographic markets unrelated to radio do not accurately or consistently reflect actual radio service, the Commission has no viable, practical alternative but to retain its adjusted contour overlap approach to defining radio markets.

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[50] *Mountain States Telephone and Telegraph Co. v. FCC*, 939 F.2d 1021, 1034 (D.C. Cir. 1991) (court vacated FCC order altering certain accounting requirements applicable to telecommunication service companies).

[51] *ALLTEL Corp. v. FCC*, 838 F.2d 551, 560 (D.C. Cir. 1988) (FCC's modification of cost accounting rules for local exchange carriers was found arbitrary and capricious, as the FCC did not show that its elimination of the "possibility of some unknown amount of suspected abuse" under the old rule "outweighs the other disadvantages" of the FCC's new rule). *See also Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752, 764 (6th Cir. 1995) (rules restricting eligibility of certain cellular entities to bid on new wireless licenses were found arbitrary because FCC failed to show "documentary support for its asserted fears" that the market for new wireless services would be detrimentally affected it these cellular providers became wireless licensees).

III. Conclusion.

Despite considerable efforts to find a geographic market definition that would establish rational and coherent radio markets, NAB and Saga must conclude that the Commission's contour overlap approach defines radio markets more accurately and consistently than pre-defined geographic markets. As shown in the attached study by BIA, the two pre-existing market definitions suggested by the Commission – Metropolitan/Micropolitan Statistical Areas and Cellular Market Areas – both suffer from very serious drawbacks that make them unsuitable for defining radio markets. MAs fail to cover the entire country, overlap with Arbitron metros, are not consonant with actual patterns of radio service, and would create anomalous radio markets that frequently undercount the number of stations serving the market. Even greater numbers of CMAs overlap with Arbitron metros. CMAs would also assign to the same market radio stations that do not compete against each other (due to their wide geographic separation in the large CMAs), and, in many other instances, would assign stations that actually do compete against each other to separate markets, thereby understating the number of stations that should be regarded as being in the market. Two additional options for developing a geographic market similarly failed, after considerable study, to produce any practical, useable approach to defining radio markets.

In contrast, the Commission's traditional approach of utilizing station contours to define radio markets does not suffer from these many drawbacks of geographically defined markets. Unlike MAs and CMAs, the contour overlap approach actually relates to radio. Contours reflect radio service in the "real world," accurately identify stations with the potential to compete against each other for listeners and advertisers, and work equally well in all parts of the country, whether East or West, urban or rural. Contours are also not artificially restricted by county or state boundaries, unlike MAs and CMAs. Moreover, the Commission has already adjusted the contour overlap approach to correct the only two anomalies that had been shown to occur with any frequency when utilizing this approach. And despite theoretical concerns as to the unusualness or singularity of the contour overlap approach, it would be the use of pre-defined geographic markets unrelated to the radio industry that the Justice Department would find inconsistent with accepted methods for determining the relevant geographic market in assessing radio transactions.

Accordingly, the Commission can show no basis for rejecting its adjusted contour overlap approach in favor of a geographically-defined market that does not relate in any way to radio and that consequently produces demonstrably anomalous and, indeed, irrational results in defining radio markets. Because geographic markets unrelated to radio do not reflect radio service as consistently, accurately or predictably as contours, the Commission has no viable, practical alternative but to retain its contour overlap approach for defining radio markets in areas not located in Arbitron metros.

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October 6, 2003